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*Lead Counsel for the Indirect Purchaser Plaintiffs*

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

IN RE: CATHODE RAY TUBE (CRT)  
ANTITRUST LITIGATION

Master File No. 07-cv-05944-JST

MDL No. 1917

This Document Relates to:

ALL INDIRECT PURCHASER  
ACTIONS

**DECLARATION OF MARIO N. ALIOTO IN  
SUPPORT OF INDIRECT PURCHASER  
PLAINTIFFS' MOTION UNDER FEDERAL  
RULE OF CIVIL PROCEDURE 62.1 FOR  
AN INDICATIVE RULING ON THEIR  
REQUEST TO AMEND THE FEE ORDER  
AND APPROVE REVISED PLAN OF  
DISTRIBUTION**

Hearing Date: November 15, 2018

Time: 2:00 p.m.

Courtroom: 9, 19<sup>th</sup> Floor

Judge: Honorable Jon S. Tigar

1 I, Mario N. Alioto, declare:

2 1. I am an attorney duly licensed by the State of California and am admitted to  
3 practice before this Court. I am a partner with the law firm Trump, Alioto, Trump & Prescott,  
4 LLP and my firm serves as the Court-appointed Lead Counsel for the Indirect Purchaser  
5 Plaintiffs (“IPPs”) in the above-captioned action. I submit this Declaration in support of the  
6 IPPs’ Motion Pursuant to Federal Rule of Civil Procedure 62.1 For An Indicative Ruling on Their  
7 Motion to Amend the IPP Fee Order and Amend the Plan of Distribution, filed herewith. The  
8 matters set forth herein are within my personal knowledge and if called upon and sworn as a  
9 witness I could competently testify regarding them.

10 2. The three remaining Objector-Appellants and their counsel are:

- 11 a. Anthony Gianasca, Gloria Comeaux, Mina Ashkannejhad individually and/or as  
12 Administrator of the Estate of the Late R. Deryl Edwards, Jr., Jeffrey Speaect,  
13 Rosemary Ciccone, and Jeff Craig, all of whom are represented by Robert  
14 Bonsignore, who was counsel of record in this litigation from its inception;
- 15 b. Rockhurst University, Gary Talewsky, and Harry Garavanian, all of whom are  
16 represented by Theresa Moore (who was counsel of record in this litigation from  
17 its inception) and Polly Estes, who appeared as counsel on appeal; and
- 18 c. Dan L. Williams & Co. (“Williams”), which is represented by Brian Torres of  
19 Brian M. Torres, PA, John Crabtree of Crabtree & Auslander, and Francis  
20 Scarpulla of the Law Offices of Francis O. Scarpulla. Mr. Scarpulla was counsel  
21 of record in this litigation from its inception. This Court dismissed Mr.  
22 Scarpulla’s objections to the settlements for lack of standing. *See* Final Approval  
23 Order at 34-36. The Ninth Circuit agreed and dismissed Mr. Scarpulla’s appeal  
24 for lack of standing. ECF No. 5127. However, Mr. Scarpulla later appeared on  
25 behalf of Williams. Mr. Scarpulla’s co-counsel, Messrs. Torres and Crabtree, are  
26 well-known professional objectors. They did not previously appear on behalf of

1 Williams before this Court. They only appeared in the Ninth Circuit around the  
2 time the opening briefs on appeal were filed.

3 3. Attached hereto as Exhibit A is a true and correct copy of the transcript of the  
4 April 10, 2018 hearing before the Ninth Circuit Panel.

5 4. The Net Settlement Fund has been earning interest for close to four years. The  
6 interest to date amounts to approximately \$9 million net of taxes.

7  
8 I declare under penalty of perjury under the laws of the United States that the foregoing is  
9 true and correct. Executed this 1st day of October 2018 at San Francisco, California.

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/s/ Mario N. Alioto  
Mario N. Alioto

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***Lead Counsel for the Indirect Purchaser Plaintiffs***

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# **EXHIBIT A**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 16-16368

D.C. No. 3:07-cv-05944-JST  
Northern District of California, San Francisco  
ORDER

In re: CATHODE RAY TUBE (CRT)  
ANTITRUST LITIGATION,  
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INDIRECT PURCHASER PLAINTIFFS,

Plaintiff-Appellee,

Vs.

JOHN FINN; LAURA TOWNSEND FORTMAN,

Objectors-Appellants,

Vs.

TOSHIBA CORPORATION; et al.,

Defendants-Appellees.

In re: CATHODE RAY TUBE (CRT)  
ANTITRUST LITIGATION,  
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<p style="text-align: right;"><b>Page 2</b></p> <p>1 No. 16-16371 D.C. No. 3:07-cv-05944-JST</p> <p>2 3 INDIRECT PURCHASER PLAINTIFFS, 4 Plaintiff-Appellee, 5 Vs. 6 SEAN HULL; GORDON B. MORGAN, 7 Objectors-Appellants, 8 Vs. 9 TOSHIBA CORPORATION; et al., 10 Defendants-Appellees. 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;"><b>Page 4</b></p> <p>1 No. 16-16374 D.C. No. 3:07-cv-05944-JST</p> <p>2 3 In re: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION, 4 ----- 5 INDIRECT PURCHASER PLAINTIFFS, 6 Plaintiff-Appellee, 7 Vs. 8 DONNIE CLIFTON, 9 Objector-Appellant, 10 Vs. 11 TOSHIBA CORPORATION; et al., 12 Defendants-Appellees. 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;"><b>Page 3</b></p> <p>1 No. 16-16373 D.C. No. 3:07-cv-05944-JST</p> <p>2 3 In re: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION, 4 ----- 5 INDIRECT PURCHASER PLAINTIFFS, 6 Plaintiff-Appellee, 7 Vs. 8 ANTHONY GIANASCA; et al., 9 Objectors-Appellants, 10 Vs. 11 TOSHIBA CORPORATION; et al., 12 Defendants-Appellees. 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;"><b>Page 5</b></p> <p>1 No. 16-16377 D.C. No. 3:07-cv-05944-JST</p> <p>2 3 In re: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION, 4 ----- 5 INDIRECT PURCHASER PLAINTIFFS, 6 Plaintiff-Appellee, 7 Vs. 8 JOSIE SAIK, 9 Objector-Appellant, 10 Vs. 11 TOSHIBA CORPORATION; et al., 12 Defendants-Appellees. 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

2 (Pages 2 to 5)

<p style="text-align: right;"><b>Page 6</b></p> <p>1 D.C. No. 3:07-cv-05944-JST  2 In re: CATHODE RAY TUBE (CRT)  ANTITRUST LITIGATION,  3 -----  4 INDIRECT PURCHASER PLAINTIFFS,  5 Plaintiff-Appellee,  6 Vs.  7 DAN L. WILLIAMS &amp; CO.,  8 Objector-Appellant,  9 Vs.  10 TOSHIBA CORPORATION; et al.,  11 Defendants-Appellees.  12  13  14  15  16  17  18  19  20  21  22  23  24  25</p>	<p style="text-align: right;"><b>Page 8</b></p> <p>1 No. 16-16399  16-16400  2 D.C. No. 3:07-cv-05944-JST  3 In re: CATHODE RAY TUBE (CRT)  4 ANTITRUST LITIGATION,  5 -----  6 INDIRECT PURCHASER PLAINTIFFS,  7 Plaintiff-Appellee,  8 Vs.  9 ANTHONY GIANASCA; et al.,  10 Movants-Appellants,  11 Vs.  12 TOSHIBA CORPORATION; et al.,  13 Defendants-Appellees.  14  15 TRANSCRIPT OF PROCEEDINGS  16  17  18  19 BEFORE: THE HONORABLE KIM McLANE WARDLAW  THE HONORABLE RICHARD CLIFTON  THE HONORABLE ROBERT KATZMANN  20  21  22  23  24  25</p>
<p style="text-align: right;"><b>Page 7</b></p> <p>1 No. 16-16379  D.C. No. 3:07-cv-05944-JST  2 In re: CATHODE RAY TUBE (CRT)  3 ANTITRUST LITIGATION,  4 -----  5 INDIRECT PURCHASER PLAINTIFFS,  6 Plaintiff-Appellee,  7 Vs.  8 ROCKHURST UNIVERSITY; et al.,  9 Objectors-Appellants,  10 Vs.  11 TOSHIBA CORPORATION; et al.,  12 Defendants-Appellees.  13  14  15  16  17  18  19  20  21  22  23  24  25</p>	<p style="text-align: right;"><b>Page 9</b></p> <p>1 MR. BONSIGNORE: Good morning, may it please the  2 Court, Robert James Bonsignore appearing for appellant  3 objectors Anthony Gianasca, Jeffrey Craig, Nina A.  4 Edwards, Gloria Comeaux, and Rosemary Ciccone. Our  5 argument will be divided into three, Polly Estes and  6 John Crabtree will follow. We'll do our best to reserve  7 seven minutes of rebuttal time keeping our eye on the  8 clock.  9 JUDGE WARDLAW: Well, Counsel, so are you -- so  10 we've been receiving word Friday of settlements. Can  11 you explain who is settling and what's happening?  12 MR. BONSIGNORE: Yes, Your Honor, to be candid  13 there's a cottage industry of professional objectors.  14 All of them have settled. The lawyers remaining in the  15 case, it's my understanding, have never objected to a  16 class action settlement before, if that answer --  17 JUDGE CLIFTON: But there are people still  18 left -- I mean, not everybody has gone away.  19 MR. BONSIGNORE: No, my clients, I have Anthony  20 Gianasca from Massachusetts, Jeffrey Craig from New  21 Hampshire, Nina Edwards is from Missouri, Gloria Comeaux  22 from Nevada, and Rosemary Ciccone is from Rhode Island.  23 JUDGE WARDLAW: So they're all from repealed  24 states?  25 MR. BONSIGNORE: The admitted repealer states</p>

<p style="text-align: right;"><b>Page 10</b></p> <p>1 are Massachusetts, which is Gianasca, New Hampshire, 2 which is Craig, and Missouri, which is Edwards. The 3 admitted were repeal states. 4 JUDGE CLIFTON: And the other two were from 5 non-repealer states. 6 MR. BONSIGNORE: The non-repealer state 7 is -- states are covered by Gloria Comeaux from Nevada. 8 JUDGE CLIFTON: Okay. 9 JUDGE WARDLAW: All right. All right. You may 10 proceed. 11 MR. BONSIGNORE: My argument will focus on 12 errors of law committed by the district court that 13 compel this appellate board to reverse and remand. If 14 time permits there's one abuse of discretion that I'd 15 like to possibly have the Court look at because of the 16 importance in jurisprudence and to provide a future 17 guidance to district courts that addresses the omission 18 from the record of evidence that went to the lynchpin of 19 its decision if we have time. 20 The law is clear on several contextual points. 21 A district court may not waive rule 23(A)(4), due 22 process, and substitute in a rule 23(E), 23 adequacy -- sorry, fairness of settlement analysis. It 24 just can't be done. That law is found in Ortiz. It's 25 found in Molsky, which is a Ninth Circuit case and</p>	<p style="text-align: right;"><b>Page 12</b></p> <p>1 denied their due process rights would receive their day 2 in court. I would refer the Court, I have, anticipating 3 the questions of the Court, I have the home run cases. 4 The one at bat is the one that hits your point directly. 5 And this is actually a grand slam. On third base 6 leading off was Amcan. That's the seminal decision of 7 the United States Supreme Court rejecting a settlement 8 class certification based on lack of adequate 9 representation. 10 It also established the notion that structural 11 protections such as subclassing are in necessary under 12 certain circumstances to ensure due process. That's 13 found at 521 U.S. 591, and that is a 1997 case. Ortiz 14 is on second, 527 U.S. 815, 1999 case. That's another 15 seminal United States Supreme Court decision case that 16 applies a heightened scrutiny standard to settlement 17 class certification. It held that (inaudible) of 18 settlement cannot substitute for presence of rule 23(A) 19 review. 20 JUDGE CLIFTON: But let me -- 21 MR. BONSIGNORE: Yes. 22 JUDGE CLIFTON: Judge Wardlaw was posing the 23 question what happens. You talk about going back, when 24 I asked the same question maybe in a slightly different 25 way, which is that is there any reason to anticipate</p>
<p style="text-align: right;"><b>Page 11</b></p> <p>1 another case with very precise languages of payment 2 cards. 3 The second principle of law is that an 4 approval of a settlement class is subject to heightened 5 scrutiny. That's in Amcan once again. The third point 6 is that it's a duty -- it is the duty of the moving 7 party under rule 23(A)(4) to establish its burden. The 8 burden cannot be shifted to the objector under 23(A)(4) 9 under 23(E), yes. 10 The fourth point is appellate review of 11 certification under rule 23(A) must be established 12 without dependence to the settlement terms. The 13 settlement terms can be looked at generally under 23(E). 14 It can be looked at more specifically but under 23(A) 15 the finding of adequacy of representation cannot be 16 based on the terms of the settlement. 17 JUDGE WARDLAW: All right. So what if we were 18 to agree with you? What would happen? 19 MR. BONSIGNORE: What would happen if it's 20 remanded? 21 JUDGE WARDLAW: Reversed because the Court 22 applied wrong legal standard in determining adequacy. 23 MR. BONSIGNORE: It would go back and the 24 issues, all the issues would be briefed. The litigation 25 would commence, and the people who were omitted and</p>	<p style="text-align: right;"><b>Page 13</b></p> <p>1 anything other than the district court reciting the 2 words it's supposed to recite in order to check off that 3 box? If you look at the district court's decision, it 4 in fact talks about conflict of interest which seems to 5 be the key factor behind the adequacy of representation 6 issue. And so I don't quarrel with the proposition that 7 the district court have used different words to get 8 around this concern, but I'm not sure that substantively 9 the Court hasn't already answered the question for its 10 purposes. Why shouldn't we just look to that? 11 MR. BONSIGNORE: That's exactly what happened in 12 Community Bank, which is a Third Circuit case. It 13 exactly happened like that. The facts mirror almost 14 identically -- actually, the theors of law almost 15 mirror exactly the cases here. 16 What would happen if the district court had 17 carried out its 23(A)(4) review on adequacy was -- would 18 be that it would find that the named class 19 representatives, which by the way in this case weren't 20 named, were not adequate representatives, and beyond 21 that class counsel did not vigorously pursue this case 22 and did not vigorously pursue them. The question that 23 would be asked by the Court, there's three of them, are 24 the interests aligned. 25 Number two, are the interests of the class</p>



<p style="text-align: right;"><b>Page 14</b></p> <p>1 representatives and the class members in conflict? The</p> <p>2 third question the Court would ask and have to answer</p> <p>3 under a 23 (A) review, which was never carried out, it</p> <p>4 was never carried out here, and I'll explain -- I'll</p> <p>5 read the language from the opinion after I raise this</p> <p>6 last point.</p> <p>7 The third question would be have the class</p> <p>8 representatives and class counsel vigorously prosecuted</p> <p>9 the class member's claims. This is the individual class</p> <p>10 members, not as a whole, not the general bulk of work</p> <p>11 that was thrown at this appellate party in the</p> <p>12 responsive brief but what did they do for Massachusetts</p> <p>13 class members. What did they do for New Hampshire class</p> <p>14 members, what did they do for Missouri class members.</p> <p>15 In this particular case the Court would find</p> <p>16 it would first of all have to identify who the class</p> <p>17 represents were that represented Massachusetts, New</p> <p>18 Hampshire, and Missouri. There's none named. None had</p> <p>19 aligned interests. It didn't identify who they were.</p> <p>20 These representatives did not hold the same claims as</p> <p>21 the Massachusetts class members, the New Hampshire class</p> <p>22 members, or the Missouri class members. All the other</p> <p>23 repealer states had their own class representatives.</p> <p>24 They fought, they got it recovered. Here they did not.</p> <p>25 So it's not just the fact, however, that they</p>	<p style="text-align: right;"><b>Page 16</b></p> <p>1 class representative that advocates for your rights.</p> <p>2 Here they didn't. They didn't assert claims. That in</p> <p>3 itself is a conflict.</p> <p>4 JUDGE WARDLAW: Well, are those claims different</p> <p>5 from the other repealer states?</p> <p>6 MR. BONSIGNORE: Absolutely not. The only thing</p> <p>7 different is that with the other repealer states lead</p> <p>8 counsel prosecuted them. They've try -- the appellees</p> <p>9 have tried to turn the burden on its head. It is not</p> <p>10 the burden of the absent class members to come -- to</p> <p>11 come forward and put someone in the case. That is</p> <p>12 clearly the duty of lead counsel, and that's found in</p> <p>13 the wording of the law, of the rule, rather, and it's</p> <p>14 found in every case that's ever interpreted this.</p> <p>15 JUDGE WARDLAW: What would lead counsel have</p> <p>16 done?</p> <p>17 MR. BONSIGNORE: There's lots of cases that</p> <p>18 cite, and in fact, the order appointing lead counsel</p> <p>19 said that he is to represent their interests. So</p> <p>20 there's a case in New York where lead counsel went out</p> <p>21 and contacted a number of class, potential class reps by</p> <p>22 solicitation and he was ethically charged. And they</p> <p>23 said no, it's his duty to do that. In this particular</p> <p>24 case we can just break it right down to what could he</p> <p>25 have done. He shouldn't have dismissed Gianasca, which</p>
<p style="text-align: right;"><b>Page 15</b></p> <p>1 had an economic recovery, they had people zealously</p> <p>2 representing them and protecting their interests. Now</p> <p>3 how do we know that?</p> <p>4 JUDGE CLIFTON: Well, who is the they in the</p> <p>5 question you --</p> <p>6 MR. BONSIGNORE: They're not named in the</p> <p>7 opinion, the class --</p> <p>8 JUDGE CLIFTON: You said they had somebody</p> <p>9 vigorously representing them and I'm lost in who the</p> <p>10 they is in this sentence. I mean, are you talking about</p> <p>11 the people from the, what is it, 22 states?</p> <p>12 MR. BONSIGNORE: Yes.</p> <p>13 JUDGE CLIFTON: And so you're distinguishing</p> <p>14 that group from your clients in the three states plus</p> <p>15 the, I guess, potentially non-repealer states as well.</p> <p>16 MR. BONSIGNORE: Yes, I'm focusing on the</p> <p>17 omitted repealer states of Massachusetts, New Hampshire,</p> <p>18 and Missouri. They did not have a class representative</p> <p>19 named. There is absolutely no law that allows that to</p> <p>20 occur.</p> <p>21 JUDGE CLIFTON: Well --</p> <p>22 JUDGE WARDLAW: Okay.</p> <p>23 MR. BONSIGNORE: In fact, the rule explicitly</p> <p>24 says you have to have a class representative and all the</p> <p>25 case law that interprets it says you need to have a</p>	<p style="text-align: right;"><b>Page 17</b></p> <p>1 was the first class representative. He just dumped</p> <p>2 them. There's not one letter, not one communication,</p> <p>3 there's not one scintilla of evidence anywhere in the</p> <p>4 record that he notified Mr. Gianasca that he was</p> <p>5 discharging him.</p> <p>6 So number one, he could have called up</p> <p>7 Mr. Gianasca and asked him do you have receipts. I</p> <p>8 guess he never said what this big process is that he</p> <p>9 used to vet. But one thing is do you have receipts,</p> <p>10 Mr. Gianasca? No. Does anyone in your family have</p> <p>11 receipts? No. Does any one of your friends? Well, I'm</p> <p>12 sure as you go along someone will have a receipt to a</p> <p>13 TV. The opinion cited that there are millions of people</p> <p>14 who were part of this class, everyone who bought a TV</p> <p>15 during expansive class period is a potential class rep.</p> <p>16 There's lawyers in the case. How many law</p> <p>17 firms in this case? Do they have existing clients?</p> <p>18 There's other cases where people have run ads. There's</p> <p>19 a lot of different ways that lead counsel should have</p> <p>20 done what he had to do under the rule of law, under his</p> <p>21 appointment. The rule of law says he has a duty to</p> <p>22 represent these people. He can't wait until after the</p> <p>23 fact, include them in his class, and then have satisfied</p> <p>24 Amcan, Ortiz, or any of the other Ninth Circuit cases.</p> <p>25 JUDGE CLIFTON: Time is limited so let me jump</p>

<p style="text-align: right;"><b>Page 18</b></p> <p>1 to what seems to be the big problem for me, at least.  2 And I'm surprised that there's not more case law on it,  3 but I've looked in our circuit's case law and don't see  4 very much with regard to what I think is the core  5 problem here, which is there's some people who get money  6 and some people who don't, and the same attorneys  7 purport to represent both groups.  8 The closest I've come, and the case that's  9 been identified in at least some of the papers, I think,  10 is the Mego case from 2000 where in fact there are class  11 members that don't get anything and our court did not  12 block the settlement because of that. Why isn't this  13 covered by the Mego case?  14 MR. BONSIGNORE: I think -- well, it's certainly  15 not covered by the Mego case. This case is  16 distinguished -- this is not a case that involves  17 gradation of a counsel, what efforts he put in. This is  18 an astound -- the facts in this case are astounding, and  19 I know that that could be --  20 JUDGE CLIFTON: Leave the adjectives out. I  21 mean we're trying to figure out if what at the end of  22 day you have a situation where some people get money and  23 some people don't, if that's an unsurmountable obstacle.  24 MR. BONSIGNORE: I will refer the Court to FER  25 54. In this particular case lead counsel disavowed his</p>	<p style="text-align: right;"><b>Page 20</b></p> <p>1 do -- represent all the class members, and it goes  2 against Ortiz, Amcan, Hess, Radcliffe, every other case  3 in the Ninth Circuit or anywhere else in the country.  4 This is not -- this is not gradation did he do enough.  5 Here we have a unique situation where lead counsel said  6 I have -- I don't have to do it, and that is not right.  7 These people, the absent class members are dependent on  8 lead counsel to represent their interests zealously.  9 Zealously, not turn around and say I don't have to  10 represent them.  11 It's also noteworthy that from the beginning  12 lead counsel purported to represent these absent class  13 members that he suddenly, in the final approval brief,  14 washes his hands of. Gianasca complaint was the first  15 complaint on file. Massachusetts filed by lead counsel  16 before there was an MDL. That's ER 2201 to 34. The  17 next was one is the first amended complaint included  18 Massachusetts, ER 2094 to 2093.  19 Second amended complaint, 1748 to 853 involved  20 the national class. A national class means a national  21 class. A national class doesn't mean forget about these  22 three states, forget about the rest, I'll include them  23 in here because it looks good and then at the end I'll  24 say all I have to do is pay attention to these 22 states  25 and forget about the rest. Absent class members, and</p>
<p style="text-align: right;"><b>Page 19</b></p> <p>1 duty to the class members. There is not another case in  2 the United States ever that has this fact, ever, because  3 the clear duty of class counsel is to represent the  4 absent class members. In this particular case --  5 JUDGE CLIFTON: I am adrift in volumes of  6 excerpts of record.  7 MR. BONSIGNORE: Okay.  8 JUDGE CLIFTON: So can you tell me what FER 54  9 is?  10 MR. BONSIGNORE: I'll read it to you. This is  11 lead counsel's --  12 JUDGE WARDLAW: Excuse me. Excuse me. We do  13 not talk during the oral argument. I'm sure you're very  14 experienced lawyers, you all know that, and when you're  15 talking out there we can't hear what's going on up here,  16 so please refrain or go outside. Thank you.  17 MR. BONSIGNORE: This is lead counsel's final  18 approval brief. These are the words of lead counsel.  19 Lead counsel was appointed to represent the interests of  20 purchasers in the 22 indirect purchaser state classes.  21 Further, lead counsel, he has no duty to represent  22 purchasers in any other state.  23 That goes against the rule 23 (A) (4), it goes  24 against the specific language, and I can read the  25 specific language of his appointment that he is to</p>	<p style="text-align: right;"><b>Page 21</b></p> <p>1 there's case law all over the place are to rely on  2 ethical rules and the black letter law and the cases  3 interpreting it that lead counsel zealously represents  4 them. They can't be in appearance of a conflict. He  5 has to hold them like a mother holding an infant,  6 protect their interests, look out for the best that they  7 can have.  8 In Missouri, what did he do for Missouri?  9 Although he claimed a national class, we can go through  10 the fourth amended complaint but it's more of the same,  11 and it was included until the final approval brief made  12 clear he didn't represent them all the way along, he's  13 not going to represent them now. What happened along  14 the way? With Missouri, prior to the settlement for no  15 economic recovery claims were never asserted. That  16 could be found at ER 726 to 27, 727, Alioto declarations  17 at paragraph 39 and 42. Plaintiff never named.  18 Notably on March -- notably at ER 788 on March  19 6th, 2012 there's evidence in the record that a Missouri  20 class representative was brought to his attention. He  21 didn't follow up. With regard to New Hampshire, New  22 Hampshire was in lead counsel's preempt DL complaint, ER  23 2201 to 304. It was also in 2243, the Nasto complaint,  24 2297, the Forgoni complaint. All the complaints, again,  25 were seeking a national nationwide class which includes</p>

<p style="text-align: right;"><b>Page 22</b></p> <p>1 the omitted repealer states. Once you include the</p> <p>2 omitted repealer states you can't decide that they</p> <p>3 disfavored. You're all in or not. If you wanted to</p> <p>4 bring a 47 --</p> <p>5 JUDGE WARDLAW: Counsel --</p> <p>6 MR. BONSIGNORE: Sorry.</p> <p>7 JUDGE WARDLAW: Excuse me, would you please</p> <p>8 refrain from speaking or leave the courtroom. Would you</p> <p>9 agree to that? Counsel, I'm looking at you. I'm asking</p> <p>10 you to stop talking during oral argument or to leave the</p> <p>11 courtroom. Okay?</p> <p>12 UNIDENTIFIED MALE: Yes, Your Honor.</p> <p>13 JUDGE WARDLAW: Thank you.</p> <p>14 All right.</p> <p>15 MR. BONSIGNORE: With regard to the efforts of</p> <p>16 the Massachusetts case, Gianasca was in, I already</p> <p>17 discussed what happened. He was just summarily</p> <p>18 dismissed with no notice to him. In came Ms. Caldwell.</p> <p>19 Ms. Caldwell was first dismissed because lead counsel</p> <p>20 didn't send out what's called the Massachusetts presuit</p> <p>21 93(A) letter.</p> <p>22 JUDGE CLIFTON: I'm going to switch gears on</p> <p>23 you.</p> <p>24 MR. BONSIGNORE: Okay.</p> <p>25 JUDGE CLIFTON: Because there's something I</p>	<p style="text-align: right;"><b>Page 24</b></p> <p>1 It's absolutely not conceded that they won't get</p> <p>2 anything. In fact, we believe they will.</p> <p>3 JUDGE CLIFTON: But hasn't the CR team largely</p> <p>4 died here? The CR team market, and so the argument is</p> <p>5 that the injunctive claims are valueless or moot.</p> <p>6 MR. BONSIGNORE: Well, we one thousand percent</p> <p>7 disagree with that position.</p> <p>8 JUDGE WARDLAW: Okay, explain why, though.</p> <p>9 MR. BONSIGNORE: Yes.</p> <p>10 JUDGE WARDLAW: Factually.</p> <p>11 MR. BONSIGNORE: Yes.</p> <p>12 JUDGE WARDLAW: Because the district court did</p> <p>13 make a finding on that point.</p> <p>14 MR. BONSIGNORE: Yes, that's not my issue, but I</p> <p>15 will --</p> <p>16 JUDGE WARDLAW: Okay.</p> <p>17 MR. BONSIGNORE: -- but I will quickly hit it.</p> <p>18 In the first place the defendants were placed on notice</p> <p>19 from word go. From pre MDL complaints they were put on</p> <p>20 notice of Massachusetts and New Hampshire. With regard</p> <p>21 to Missouri, they were put on notice through the filing</p> <p>22 of nationwide complaint after nationwide complaint</p> <p>23 throughout, and so they'll -- I believe necessities will</p> <p>24 address that. I don't want to take a long time --</p> <p>25 JUDGE CLIFTON: Well, if you need to switch</p>
<p style="text-align: right;"><b>Page 23</b></p> <p>1 want, and maybe somebody else is going to address it,</p> <p>2 but something I wanted to focus on, the district court</p> <p>3 explained the reason for the different treatment in the</p> <p>4 end as being the people that weren't going to receive</p> <p>5 any money had no hope of receiving any money because at</p> <p>6 least at that point in time they no longer had a viable</p> <p>7 claim. Why isn't that a justification for the plan of</p> <p>8 distribution?</p> <p>9 MR. BONSIGNORE: That's very hotly contested.</p> <p>10 That issue was not briefed. The district court said</p> <p>11 that it could not revive claims. There's also a</p> <p>12 question about that. That's something that will be</p> <p>13 raise when we go back to the district court. Beyond</p> <p>14 that --</p> <p>15 JUDGE CLIFTON: Well, I'm not sure --</p> <p>16 MR. BONSIGNORE: -- it's not --</p> <p>17 JUDGE CLIFTON: -- and the point of Mego, which</p> <p>18 is not on all fours, but the Court in Mego winds up</p> <p>19 saying, well, there's a category that's just not going</p> <p>20 to be able to collect. And so it winds up saying okay</p> <p>21 to the deal, even though some people walk away with</p> <p>22 nothing, because the Court apparently concluded they're</p> <p>23 not going to get anything. And why isn't that the same</p> <p>24 true here?</p> <p>25 MR. BONSIGNORE: Because it's not conceded.</p>	<p style="text-align: right;"><b>Page 25</b></p> <p>1 people this may be a good time to do it because that's</p> <p>2 the issue we're now at.</p> <p>3 JUDGE WARDLAW: This is a concern.</p> <p>4 MR. BONSIGNORE: Okay. Before I leave, one</p> <p>5 thing, just make two points, in the first place --</p> <p>6 JUDGE WARDLAW: How about if you leave and come</p> <p>7 back?</p> <p>8 MR. BONSIGNORE: Okay.</p> <p>9 JUDGE WARDLAW: Okay.</p> <p>10 MR. CRABTREE: John Crabtree before necessities.</p> <p>11 I'm going to go and go very quickly. There's much not</p> <p>12 to like about this settlement. I'm going to hit one</p> <p>13 thing hard. There's a 90 degree problem that cannot be</p> <p>14 swept under the rug. The claims that were released</p> <p>15 rationalized by statute of limitations doesn't work</p> <p>16 analytically. It's incoherent, and the reason is</p> <p>17 simple. It is one thing to say that a whole group of</p> <p>18 people's claims are not barred because the claims are</p> <p>19 brought within x-years.</p> <p>20 But it is another thing to say on a wholesale</p> <p>21 basis that everyone's claim is barred because they were</p> <p>22 highly individualized issues, that are implicated in the</p> <p>23 statute of limitations analysis. Issues relating to</p> <p>24 accrual and tolling. And Missouri, like basically every</p> <p>25 other state, has these principles. So for the Court to</p>

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1 say that everyone's claim is worthless is incoherent.  
 2 We can't to that analysis. It's the reason why we don't  
 3 allow 23(B) common law fraud claims because every person  
 4 is different.

5 JUDGE CLIFTON: Well, that cuts way broad  
 6 because even if you didn't have the conflict of  
 7 interest-type claims here, within any class settlement  
 8 you've got the possibility of some individual popping up  
 9 and say my facts are sufficiently different that it  
 10 shouldn't be covered, and you can't have a class action  
 11 if you take that too far.

12 MR. CRABTREE: What I'm saying is this, is that  
 13 you cannot force someone, in a representative action, to  
 14 release their claims for zero compensation and say they  
 15 are bound when you do so based on statute of  
 16 limitations. There are hyper individualized issues  
 17 especially --

18 JUDGE WARDLAW: Can you -- so explain to me how  
 19 someone in Missouri would be entitled to an injunctive  
 20 relief that would be value to them. Like what would it  
 21 be?

22 MR. CRABTREE: Actually, Your Honor, I was  
 23 talking only about damages really because Missouri  
 24 is --

25 JUDGE WARDLAW: Okay, damages. All right.

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1 MS. ESTES: Good morning, Your Honors. Polly  
 2 Estes on behalf of Rockhurst University.

3 JUDGE CLIFTON: Hold the mic.

4 JUDGE WARDLAW: Louder.

5 MS. ESTES: Sorry, I'm short.

6 JUDGE CLIFTON: We understand.

7 MS. ESTES: Is that better? Okay.

8 I'm Polly Estes. I'm representing Rockhurst  
 9 University, et al., and we have claimants from each of  
 10 the three omitted repealer states. Let me try to start  
 11 by answering Your Honors questions that you've had so  
 12 far. What would happen on remand? First of all, the  
 13 district court should appoint separate counsel to  
 14 represent these omitted repealer states.

15 Secondly, that counsel would file a new  
 16 amended consolidated complaint that would include claims  
 17 of each of these omitted repealer states, and those  
 18 claims would relate back to the filing of the original  
 19 complaints.

20 Secondly, you asked -- I'm sorry, oh, I see  
 21 two minutes. You asked what should lead counsel have  
 22 done? Excellent question. We are charging not only the  
 23 final order of proving the settlement but also the 2010  
 24 order approving the stipulation. And if Your Honors  
 25 will read Koby vs. ARS National Services and Reynolds

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1 Explain what the value given -- okay. Explain that  
 2 specifically, concrete terms.

3 MR. CRABTREE: Okay. So in concrete terms --

4 JUDGE WARDLAW: Like what would they have that  
 5 they don't have?

6 MR. CRABTREE: Missouri is a state that is an  
 7 Illinois repealer state by court construction of their  
 8 consumer practices act. That's why NLCD, and I wanted  
 9 to correct the record, I actually -- we do a lot of  
 10 repeals in class actions. I did do an objection in the  
 11 LCD case. I have done one. And in that case I'm quite  
 12 aware that there was relief for the Missouri people  
 13 because the Court ruled that the claims were sufficient.  
 14 And in fact, Mr. Alioto was counsel in that case.

15 I don't want to take any more time from  
 16 Ms. Estes. She needs to go too. But I would like to  
 17 make one final point before I step away, and that is  
 18 that the lode star cross check in this case was nothing  
 19 but theater. It was a spot check of a spot check of a  
 20 small minority of cases, and all it revealed was even  
 21 the records that came out was that you had block  
 22 billing, quarter hourly billing and half hazard records.  
 23 That's not enough to justify an upward departure from  
 24 benchmark in a mega fund case.

25 Thank you, Your Honors.

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1 vs. Beneficial National Bank, I think those two cases  
 2 tell you what it is that both lead counsel and the  
 3 district court should have done at the stage of the  
 4 stipulation and at the stage of the settlement.

5 So what should lead counsel have done? Well,  
 6 first of all, she should have found a plaintiff from  
 7 Missouri as he in fact --

8 JUDGE CLIFTON: Well, this ground we've covered.  
 9 The question I posed, and before -- I'd like to get an  
 10 answer before the time runs out, is why can't the  
 11 district court's decision that the people in those three  
 12 states can properly be excluded from receiving any money  
 13 be justified based on the distinction the Court found  
 14 with regard to their not going to get any money anyway.  
 15 It's too late for them.

16 MS. ESTES: The only reason they're not going to  
 17 get any money and the only reason that their claims have  
 18 no value withdraws the other repealer state's claims do  
 19 have value is that lead counsel committed malpractice.

20 JUDGE CLIFTON: Fine. They can sue them for  
 21 malpractice. That doesn't really help us now.

22 MS. ESTES: That can't, the statute of  
 23 limitations --

24 JUDGE CLIFTON: Oh, then if they can't then they  
 25 can't.

8 (Pages 26 to 29)

<p style="text-align: right;"><b>Page 30</b></p> <p>1 MS. ESTES: However --</p> <p>2 JUDGE CLIFTON: But that doesn't -- no, hear me</p> <p>3 out here.</p> <p>4 MS. ESTES: Okay.</p> <p>5 JUDGE CLIFTON: It may be that those people</p> <p>6 can't properly be represented and can't be included</p> <p>7 within this settlement. I don't know what it is that</p> <p>8 makes the lead counsel go out and represent somebody he</p> <p>9 doesn't represent. You're saying he doesn't represent</p> <p>10 them so he can't release their claims. That argument I</p> <p>11 hear. The argument that he's committed malpractice</p> <p>12 somehow and people would like to bring malpractice</p> <p>13 claims against him because -- but can't because of</p> <p>14 limitation period, that argument I don't hear.</p> <p>15 What I want to know is why is the plan of</p> <p>16 distribution faulty when the Court distinguishes between</p> <p>17 people that have claims that live today and people that</p> <p>18 don't have claims that live today.</p> <p>19 MS. ESTES: Okay. One minor distinction in what</p> <p>20 you said previously. I am not asserting that lead</p> <p>21 counsel did not represent the omitted repealer states.</p> <p>22 He, in fact, did and he --</p> <p>23 JUDGE CLIFTON: Well, for a period of time he</p> <p>24 purported to do so. And even now he purports to do so.</p> <p>25 MS. ESTES: Right up to the very end. Right up</p>	<p style="text-align: right;"><b>Page 32</b></p> <p>1 didn't -- because that would go to mean to something</p> <p>2 that was adequacy of representation from the outset that</p> <p>3 he didn't -- you're saying he didn't properly plead the</p> <p>4 claims.</p> <p>5 MS. ESTES: Yeah, so from --</p> <p>6 JUDGE WARDLAW: As oppose to pursue them?</p> <p>7 MS. ESTES: Both. So for Missouri, he just</p> <p>8 simply never ever pleaded any -- any damages claims on</p> <p>9 behalf of that class in a consolidated complaint. For</p> <p>10 New Hampshire, he failed to take the complaint that had</p> <p>11 been filed and sent into this MDL and include it into</p> <p>12 the consolidated amended complaint.</p> <p>13 For Massachusetts, he did attempt to plead</p> <p>14 claims but he failed twice to give the requisite 30-day</p> <p>15 notice, which the special master specifically instructed</p> <p>16 him he had to do.</p> <p>17 JUDGE WARDLAW: Explain to your theory on why</p> <p>18 these claims are viable.</p> <p>19 MS. ESTES: They are viable because if this</p> <p>20 Court reverses both the order approving the settlement</p> <p>21 and the order approving the stipulation then a fifth</p> <p>22 amended complaint can be filed which will relate back to</p> <p>23 the original complaint. Now, so -- and the original</p> <p>24 complaint here will be for Massachusetts, which was</p> <p>25 included in the consolidated amended complaint, for New</p>
<p style="text-align: right;"><b>Page 31</b></p> <p>1 to the very end no other counsel was ever appointed. So</p> <p>2 he maintained a fiduciary duty to those claimants</p> <p>3 through to the end.</p> <p>4 JUDGE CLIFTON: Well, yes and no because at a</p> <p>5 point in time he gets -- he gets -- there's certified</p> <p>6 classes, and the certified classed don't appear to cover</p> <p>7 the three omitted states.</p> <p>8 MS. ESTES: Yes, and they sought class</p> <p>9 certification at the very end in conjunction with</p> <p>10 seeking a settlement. But let me go back to what I</p> <p>11 think is your ultimate question, why was the district</p> <p>12 court wrong that these three states no longer had viable</p> <p>13 claims. The reason they no longer had viable claims was</p> <p>14 the 2010 stipulation, which itself should never have</p> <p>15 been approved by the district court.</p> <p>16 JUDGE CLIFTON: We're hearing a phone in the</p> <p>17 room now? Come on, guys.</p> <p>18 JUDGE WARDLAW: Come on. Who has got the phone?</p> <p>19 MS. ESTES: The only reason the 2010 stipulation</p> <p>20 was ever entered was to cover up lead counsel's</p> <p>21 negligence in failing to properly plead claims on behalf</p> <p>22 of these three states. In that stipulation, if you read</p> <p>23 it, the omitted repealer states --</p> <p>24 JUDGE WARDLAW: I want to hear this correctly</p> <p>25 because properly plead claims. They never -- you</p>	<p style="text-align: right;"><b>Page 33</b></p> <p>1 Hampshire, which had a complaint which should have</p> <p>2 been -- which was transferred into this MDL and made a</p> <p>3 part of this whole case, and for Missouri because</p> <p>4 Missouri has always been a part of the nationwide class</p> <p>5 and so claims have always been asserted on behalf of</p> <p>6 Missouri as well.</p> <p>7 I see that my time is up. If Your Honors have</p> <p>8 any other questions, I'm happy to answer them.</p> <p>9 JUDGE WARDLAW: Not at this time. Perhaps after</p> <p>10 we hear from the other side.</p> <p>11 MS. ESTES: Okay. Thank you very much.</p> <p>12 MR. MOSKOVITZ: Good morning, Your Honors.</p> <p>13 Myron Moskowitz for the appellee here. The Court</p> <p>14 reviews the settlement of a class action for abusive</p> <p>15 discretion, and that means deference. That's the</p> <p>16 general rule. But there's some particular reasons why</p> <p>17 that rule applies with special force here. Six judges</p> <p>18 had a hand in this settlement. It began with Judge Legg</p> <p>19 sitting as special master handling many of the motions,</p> <p>20 then Judge Conti also sitting as special master</p> <p>21 certified the class for trial.</p> <p>22 Judge Vaughn Walker helped craft the</p> <p>23 settlement. John Fern Smith also helped craft the</p> <p>24 settlement. Then it goes to Special Master Martin Quinn</p> <p>25 who approves the settlement agreement, and then finally</p>



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1 it goes to Judge Tigar who also approves Quinn's report  
2 and the settlement agreement. You've got six judges  
3 involved in this thing. These judges heard all of the  
4 objections they're making now and rejected all of them.  
5 And they're asking you to find an abuse of discretion  
6 here.

7 Now, these approvals by Special Master Quinn  
8 and Judge Tigar were not rubber stamps. Special Master  
9 Quinn wrote a 77 page opinion.

10 JUDGE WARDLAW: You know, Counsel, all of this  
11 is true and it has absolutely no affect on me.

12 MR. MOSKOVITZ: Okay.

13 JUDGE WARDLAW: But I want to know -- I mean,  
14 yes, of course we're here and this is how we got here,  
15 but I guess what I want to know is your view and whether  
16 or not the district court applied the wrong legal  
17 standard by looking to the distribution and the amount  
18 and value of the settlement as opposed to whether  
19 everybody member of the cause was adequately represented  
20 under Ann Chen and those -- that line of cases.

21 MR. MOSKOVITZ: The fundamental problem with all  
22 of their arguments of the objectors, they're claiming  
23 that lead counsel, Mr. Alioto, didn't adequately  
24 represent the consumers from the three repealer states,  
25 New Hampshire, Massachusetts, and Missouri.

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1 fixing defendants on behalf of every indirect purchaser  
2 in the country. All right. Now, you can get that under  
3 the Clayton Act. That covers all 50 states. All right.

4 The consumers in those three states were  
5 included in that class and from that Mr. Alioto tried,  
6 in front of Judge Legg to have the people from those  
7 states represented to get the state damages. You can't  
8 get damages under the Clayton or Sherman Act under  
9 Illinois brick but under the state law you can. And  
10 he -- since he didn't have people from those states he  
11 tried before Judge Legg, and he had some law to support  
12 him but apparently there's a conflict. Judge Legg ruled  
13 against them. All right.

14 Now, the only thing for Mr. Alioto to do in  
15 order to pursue those three state damage claims is to  
16 get representatives from those states. Now, Mr. Alioto  
17 can't do that. He's licensed in California. He can't  
18 go to Massachusetts and hang out a sign and say sign up  
19 for this case. He can't do that. And he can't do that  
20 in any of the --

21 JUDGE WARDLAW: He could get local counsel to do  
22 it.

23 MR. MOSKOVITZ: Yeah, exactly. He depends on  
24 local counsel to do it. In 22 states local counsel was  
25 cooperative. In those -- in Missouri you've got nobody.

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1 The fundamental problem is they had no  
2 representatives from those states. Now, Ms. Estes, in  
3 her brief blames Mr. Alioto for this. She says it's  
4 easy to get these people. Well, I don't think she has  
5 much experience with actually litigating --

6 JUDGE CLIFTON: For myself, I don't care that  
7 they may or may not have been able to go out and find  
8 somebody. My problem now is that we've got a settlement  
9 teed up that purports to release, that does release  
10 claims on behalf of people from those states.

11 MR. MOSKOVITZ: Yeah.

12 JUDGE CLIFTON: Without appearing to have any  
13 return to them and without appearing to have anybody at  
14 the table speaking for them. The fact that Mr. Alioto  
15 couldn't find somebody from Missouri, I accept that  
16 fine. That's probably the case, but then how is it that  
17 he releases their claims since he doesn't have anybody  
18 from Missouri that he seems to be looking after. I  
19 mean, a deal that says I'm giving away your claims over  
20 there and my people over here get money seems to have a  
21 piece missing like those people over there.

22 MR. MOSKOVITZ: That would be troublesome if  
23 that's what happened. That's not what happened. This  
24 case began as a nationwide class action for an  
25 injunction under the Clayton Act against these price

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1 In those three states --

2 JUDGE WARDLAW: Massachusetts seems like a very  
3 unlikely state where you wouldn't be able to get anyone.

4 MR. MOSKOVITZ: Well, I'll tell you what  
5 happened. He depended on people like Mr. Bonsignore to  
6 get people for him. And Mr. Bonsignore, a few minutes  
7 ago said I did that. I got plaintiffs from  
8 Massachusetts. Well, here's what Special Master Quinn  
9 found on that on page 40. Bonsignore claims that his  
10 client Gianasca was truly vetted and ready to serve as a  
11 representative plaintiff. Mr. Alioto swears he never  
12 refused to add a viable plaintiff to this case and this  
13 just didn't happen.

14 Special Master Quinn says, having reviewed the  
15 documents claiming to show that Mr. Bonsignore proffered  
16 a viable plaintiff. The special master includes that  
17 Mr. Alioto's version of facts is more credible.

18 JUDGE CLIFTON: So there's no plaintiff --

19 MR. MOSKOVITZ: And this happened --

20 JUDGE CLIFTON: -- no class representative from  
21 Massachusetts.

22 MR. MOSKOVITZ: Pardon me?

23 JUDGE CLIFTON: So there's no class  
24 representative from Massachusetts.

25 MR. MOSKOVITZ: There's no one from any of these

10 (Pages 34 to 37)

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1 three states.  
2 JUDGE CLIFTON: So how does Mr. Alioto purport  
3 to represent people from Massachusetts in extinguishing  
4 and releasing their claims?  
5 MR. MOSKOVITZ: Because he represented them as  
6 members of the nationwide class for the injunction. All  
7 right. And --  
8 JUDGE CLIFTON: And then we get to -- which  
9 nobody seems to be much concerned about today. We're  
10 talking at money.  
11 MR. MOSKOVITZ: No, I know that.  
12 JUDGE CLIFTON: And the people in Massachusetts  
13 are being told that your claims are being released.  
14 MR. MOSKOVITZ: I realize that.  
15 JUDGE CLIFTON: Including whatever claims you  
16 might have for money even though I didn't get you any  
17 money and I didn't have any plaintiff as a class  
18 representative looking out after your particular  
19 interests. How can that be?  
20 MR. MOSKOVITZ: They go into settlement  
21 negotiations with Mr. Alioto representing every consumer  
22 in the country because that nationwide claim for an  
23 injunction. The defendants, naturally, as they always  
24 do --  
25 JUDGE WARDLAW: It wasn't adequate because he

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1 JUDGE WARDLAW: Wait, I thought originally they  
2 did have a claim for damages?  
3 MR. MOSKOVITZ: They what?  
4 JUDGE WARDLAW: Did have a claim for damages.  
5 MR. MOSKOVITZ: Theoretically but there were no  
6 representatives there.  
7 JUDGE WARDLAW: Well, wait a second. Now that's  
8 a different issue.  
9 MR. MOSKOVITZ: No, it's not. No, Judge Legg  
10 said if you want to have a claim for damages in those  
11 three states you got to have representatives.  
12 Mr. Alioto didn't have the representatives. He depended  
13 on people like Ms. Moore, like Mr. Bonsignore to get  
14 them. They didn't get them. Okay. Mr. Alioto -- what  
15 Quinn said was this is an extraordinary achievement. He  
16 got 22 out of 25. All right. He organized the whole  
17 thing. Most lawyers in these other states were  
18 cooperative once Mr. Alioto was designated to leave  
19 counsel, they cooperate, they give him -- they either  
20 sue and then have it consolidated or they just give them  
21 to Mr. Alioto and it goes ahead and you've got an  
22 enormous settlement out of it.  
23 But Bonsignore didn't cooperate. Moore didn't  
24 cooperate. And what can he do? He's not admitted in  
25 Massachusetts.

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1 couldn't represent their claim for damages and yet he  
2 was purporting to release it.  
3 MR. MOSKOVITZ: Their claims were dead. This  
4 was what --  
5 JUDGE WARDLAW: But that's what you're saying.  
6 I realize that -- that the Court made that finding but  
7 he's saying the argument is that -- but you didn't  
8 litigate to ensure their viability.  
9 MR. MOSKOVITZ: The statute of limitations had  
10 run on all of those claims.  
11 JUDGE WARDLAW: But at the beginning, did you go  
12 back and litigate the viability of their claims?  
13 MR. MOSKOVITZ: I'm sorry, I didn't get that,  
14 Your Honor.  
15 JUDGE WARDLAW: Were they dead when they were  
16 named in the complaint?  
17 MR. MOSKOVITZ: No. No, they --  
18 JUDGE WARDLAW: Because what happened while  
19 Mr. Alioto was representing them that their claims were  
20 alive and then died.  
21 MR. MOSKOVITZ: The only claim they had in the  
22 beginning was for the nationwide injunction. They had  
23 no claims in the beginning for the damages under those  
24 state laws. Well, Mr. Alioto tried to get those but  
25 Judge Legg said you can't do that.

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1 JUDGE CLIFTON: And just for myself, I don't  
2 care about any of that.  
3 MR. MOSKOVITZ: Yeah.  
4 JUDGE CLIFTON: My problem is at the end of the  
5 day he strikes a deal that effects the claims of people  
6 from those states without a class representative from  
7 those states. Now, if you tell me, well, he can't  
8 pursue damages for them then I have to ask the question  
9 what gives him the right to release their damage claims?  
10 MR. MOSKOVITZ: Judge Clifton, earlier you cited  
11 the Mego case. In Mego, the Court said that the  
12 distribution does not have to be equal among all the  
13 claimants, depends on the value of their claims. And if  
14 you look towards the end of that discussion the Court  
15 says were we to discontinue the current class it is  
16 possible that no one will recover anything from Mego.  
17 Now that's exactly the situation here.  
18 JUDGE CLIFTON: Well, the reason for some people  
19 not collecting in Mego had to do with the adoption of  
20 the private securities litigation reform act.  
21 MR. MOSKOVITZ: Right. Right.  
22 JUDGE CLIFTON: And here the reason being given  
23 is the statute of limitations.  
24 MR. MOSKOVITZ: Right.  
25 JUDGE CLIFTON: Which objectors are busy saying,

11 (Pages 38 to 41)

<p style="text-align: right;"><b>Page 42</b></p> <p>1 look, we got lots of ways to try to finesse that. I</p> <p>2 don't know whether they're going to be successful or</p> <p>3 not, but that they have a different point of view and so</p> <p>4 you start to ask yourself -- and let me -- I understand</p> <p>5 the practicality of settlement. I practiced law for a</p> <p>6 long time. I know defendants want complete peace. But</p> <p>7 you can't always get what you want. And in this case</p> <p>8 who is at the table looking out for the people from</p> <p>9 Massachusetts and New Hampshire and Missouri? Nobody.</p> <p>10 MR. MOSKOVITZ: Yeah.</p> <p>11 JUDGE CLIFTON: And it becomes easy to do a deal</p> <p>12 that gives nobody -- the nobody there people nothing,</p> <p>13 which seems to be what happened here. Now, it may be</p> <p>14 correct that those people can't collect anything. But</p> <p>15 why is it that they have to suffer that risk and we're</p> <p>16 supposed to make that decision?</p> <p>17 MR. MOSKOVITZ: Number one, they're not</p> <p>18 suffering anything. The case is gone. The statute of</p> <p>19 limitations argument they're trying to rebut saying</p> <p>20 there's a relation back, there's tolling, you can't do</p> <p>21 any of that.</p> <p>22 JUDGE CLIFTON: Well, maybe we should ask</p> <p>23 defendants to bear that risk by saying don't get a</p> <p>24 release for those states but don't worry, you got -- no</p> <p>25 problem because the limitations period has run.</p>	<p style="text-align: right;"><b>Page 44</b></p> <p>1 been allocated to consumers from those three states</p> <p>2 you'd have a different set of objectors out here.</p> <p>3 JUDGE WARDLAW: Well, Counsel --</p> <p>4 MR. MOSKOVITZ: The objectors from the other</p> <p>5 state saying why are you giving them money. We got all</p> <p>6 these judges finding their claims are worthless and</p> <p>7 you're giving them a piece of action for, what, nuisance</p> <p>8 value. No, their claims are --</p> <p>9 JUDGE WARDLAW: Counsel, sometimes cases</p> <p>10 are -- I mean, I did this very type of litigation for</p> <p>11 many, many, many year and sometimes there is nuisance</p> <p>12 value settlement.</p> <p>13 MR. MOSKOVITZ: Well, Your Honor, lead counsel</p> <p>14 did have authority to represent these people as part of</p> <p>15 the nationwide class. Then they go to negotiate,</p> <p>16 defendant's won global peace, they want, even though the</p> <p>17 claims of those people in those three states are</p> <p>18 worthless, they still want a sign off that they won't</p> <p>19 get any nuisance suits.</p> <p>20 JUDGE CLIFTON: Well, why should they get it?</p> <p>21 If they're not willing to pay any more, why should they</p> <p>22 get what they want if in fact nobody appears to be</p> <p>23 looking out after the interests of those three states?</p> <p>24 MR. MOSKOVITZ: I don't think that's accurate.</p> <p>25 Mr. Alioto was looking out for their interest. He tried</p>
<p style="text-align: right;"><b>Page 43</b></p> <p>1 MR. MOSKOVITZ: Your Honor, if you write an</p> <p>2 opinion that says something like that --</p> <p>3 JUDGE WARDLAW: That would be very Solomonic. I</p> <p>4 think --</p> <p>5 MR. MOSKOVITZ: I think the Court should be wary</p> <p>6 of weaponizing objectors and allow them to upset these</p> <p>7 settlements. This -- this was --</p> <p>8 JUDGE CLIFTON: Wait a minute. What is</p> <p>9 sacrosanct about a settlement where you and I strike a</p> <p>10 deal that makes him over there suffer? We don't have a</p> <p>11 right to speak for him. And I don't want to kill</p> <p>12 settlements, but people only have the power to speak for</p> <p>13 themselves, and in this case I don't see anybody at the</p> <p>14 table speaking for the people from Massachusetts and New</p> <p>15 Hampshire and Missouri. I hear defendants wanting to</p> <p>16 pay piece. Will they pay any more for those? I doubt</p> <p>17 it. Will the plaintiff class have to share more money</p> <p>18 to more places? Maybe so. And if they're not willing</p> <p>19 to then why are we allowed to say that the people in, I</p> <p>20 think Hawaii is a repealer state, so why should people</p> <p>21 from Hawaii be able to say we get a little bit more</p> <p>22 because people from Massachusetts, like Judge Katzmman</p> <p>23 was and probably was during the class period, he doesn't</p> <p>24 get anything.</p> <p>25 MR. MOSKOVITZ: If some of this settlement had</p>	<p style="text-align: right;"><b>Page 45</b></p> <p>1 to, in front of Judge Legg --</p> <p>2 JUDGE CLIFTON: This type of deal --</p> <p>3 MR. MOSKOVITZ: -- to -- I'm sorry?</p> <p>4 JUDGE CLIFTON: He struck a deal that gave them</p> <p>5 nothing.</p> <p>6 MR. MOSKOVITZ: Because their -- by that time</p> <p>7 their claims were worthless because the local counsel in</p> <p>8 those states did not produce any class representatives.</p> <p>9 That's what -- Judge Legg said that's what you got to</p> <p>10 do.</p> <p>11 JUDGE CLIFTON: Objectors theorize if they had</p> <p>12 somebody come in today they could try to make their</p> <p>13 complaint covering them relate back. I'm not going to</p> <p>14 opine on whether that's possible. But how is it we can</p> <p>15 adjudicate that argument?</p> <p>16 MR. MOSKOVITZ: Well, the proof of the pudding</p> <p>17 that that's not going to happen is they didn't do it.</p> <p>18 Mr. Bonsignore claims to have a client who is objecting.</p> <p>19 At any time he could have brought that client to</p> <p>20 Mr. Alioto and said join them. He didn't do it. Same</p> <p>21 thing with Ms. Moore, bring them in -- he would have</p> <p>22 been delighted to join them because that would increase</p> <p>23 the size of the settlement, increased his attorney's</p> <p>24 fees, it would have been wonderful for --</p> <p>25 JUDGE CLIFTON: Increase the size of the</p>



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1 settlement then you're telling me defendants are going  
2 to be willing to pay more for those states, which is  
3 kind of contradictory to --

4 MR. MOSKOVITZ: No. No, I'm saying if they were  
5 worth anything. Early on they were worth something  
6 before the statute of limitations ran. If they had  
7 brought people to him before it ran he would have been  
8 delighted to add that.

9 JUDGE WARDLAW: Just, I mean, I know -- I don't  
10 think we have enough in front of us on the statute of  
11 limitations but why, if they had a claim and it wasn't  
12 barred by the statute of limitations when the complaint  
13 was filed, why didn't the filing of the complaint toll  
14 the statute of limitations?

15 MR. MOSKOVITZ: Well, it would have if those  
16 people had stayed in the case but they were -- some  
17 dropped out and by the time the fourth amended complaint  
18 was filed, by the time of settlement they were out.  
19 They would have tolled if they had stayed in the case.

20 JUDGE WARDLAW: But they would have had a viable  
21 claim.

22 MR. MOSKOVITZ: They would have but it was too  
23 late. The key here is there's no plaintiffs from those  
24 states because the objectors didn't produce them. I  
25 mean, they're talking about relation backing everything.

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1 goes to attorney's fees might end up going to Missouri,  
2 New Hampshire, and Massachusetts?

3 MR. MOSKOVITZ: Well, yeah, but let's not forget  
4 about the consumers in the 22 other states. Right now  
5 they have filed something like 150,000 claims that would  
6 gobble up that entire half a billion dollars. If the  
7 settlement is disapproved it goes back to defendants.

8 JUDGE WARDLAW: Is the half billion earning  
9 interest right now?

10 MR. MOSKOVITZ: Pardon me?

11 JUDGE WARDLAW: Is the half billion earning  
12 interest in the bank right now?

13 MR. MOSKOVITZ: It's getting interest. They put  
14 it in CDs or something.

15 JUDGE WARDLAW: So it's growing.

16 MR. MOSKOVITZ: Yeah. But the money may never  
17 come back. All right. Toshiba, one of the defendants  
18 has been in financial trouble. Samsung, who contributed  
19 the largest chunk was something like four months late in  
20 putting it in. This is a very volatile industry. If  
21 this case goes to trial and there's a judgment of a  
22 similar amount there's no assurance they're going to get  
23 that money.

24 JUDGE CLIFTON: So these are all good reasons  
25 why we should tell the people of Massachusetts and the

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1 There was no motion to amend the fourth amended  
2 complaint to add them.

3 I want to respond to the question came up a  
4 couple of times about what happens if you reverse and  
5 disapprove of this settlement. All right. This  
6 settlement is over half a billion dollars, cash. No  
7 coupons, no vouchers, no (inaudible), no discounts,  
8 money in the bank. And the money is in the bank. At  
9 this point all of the defendants have paid the money  
10 into escrow.

11 Now, the terms of the settlement agreement are  
12 if the settlement agreement is undone that money goes  
13 back to the defendants. It's out of the bank, it goes  
14 back to them.

15 JUDGE WARDLAW: Let me ask you something,  
16 Counsel, how much of this is influenced by the award of  
17 attorney's fees and costs?

18 MR. MOSKOVITZ: I'm sorry, Your Honor.

19 JUDGE WARDLAW: How much of this is actually  
20 really influenced or affected or the pragmatics of  
21 undoing this influenced by the award of attorney's fees  
22 and costs, which was substantial?

23 MR. MOSKOVITZ: That entire fund is in jeopardy  
24 if the money goes back to defendants.

25 JUDGE WARDLAW: Perhaps some of the money that

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1 other states too bad.

2 MR. MOSKOVITZ: Well, let me respond --

3 JUDGE CLIFTON: I mean, I understand the  
4 practicality but I still, I've got a problem with three  
5 states being left out for reasons that may be legally  
6 valid with regard to a limitations period defense,  
7 but --

8 MR. MOSKOVITZ: Actually, it's not 23 states.  
9 It's 25 states. You left out Texas, you left out  
10 Florida, you left out Pennsylvania.

11 JUDGE CLIFTON: And them too.

12 MR. MOSKOVITZ: Those people don't get anything  
13 either.

14 JUDGE CLIFTON: That's right. And I'm willing  
15 to accept that -- and there doesn't seem to be a serious  
16 challenge that if you're from a non-repealer state  
17 you're kind of stuck when it comes to money.

18 MR. MOSKOVITZ: So were these three states.

19 JUDGE CLIFTON: So that's a Mego kind of  
20 distinction. You're offering up a limitations period  
21 kind of distinction and I'm not sure that's quite as  
22 solid as --

23 MR. MOSKOVITZ: It is.

24 JUDGE CLIFTON: -- as the difference between  
25 Texas and whoever else is a repealer state.

13 (Pages 46 to 49)

<p style="text-align: right;"><b>Page 50</b></p> <p>1 MR. MOSKOVITZ: It's the same thing. No, it's</p> <p>2 the same thing.</p> <p>3 JUDGE CLIFTON: Okay. But if you want it that</p> <p>4 way we can say fine. You've left out not just three</p> <p>5 states but 28, and I'm not sure that makes your argument</p> <p>6 any stronger.</p> <p>7 MR. MOSKOVITZ: Those people in Texas were</p> <p>8 represented by Mr. Alioto in the injunction action. All</p> <p>9 right. In the settlement they get zero. Why? Well, as</p> <p>10 you know, that's a non-repealer state. Their claims are</p> <p>11 worthless so they get nothing. At this point in time,</p> <p>12 and at the point of the time of the settlement it's</p> <p>13 exactly the same thing with Massachusetts, New</p> <p>14 Hampshire, and Missouri.</p> <p>15 JUDGE CLIFTON: Why? Because you say so.</p> <p>16 MR. MOSKOVITZ: No. Well, Special Master Quinn</p> <p>17 said so, Judge Tigar said so, and the law says so. The</p> <p>18 law says that the statute of limitations has run on</p> <p>19 these. Now, there's no emotion to amend to add any</p> <p>20 representatives from there. What they're doing is sort</p> <p>21 of conceding that but they're blaming Mr. Alioto.</p> <p>22 They're saying inadequate representation. He should</p> <p>23 have done more to get representatives from those states.</p> <p>24 He couldn't do any more. He's not licensed in those</p> <p>25 states. He has to depend on people like Mr. Bonsignore.</p>	<p style="text-align: right;"><b>Page 52</b></p> <p>1 JUDGE KATZMANN: Okay. Did anyone in the</p> <p>2 settlement and distribution negotiations have incentive</p> <p>3 to advocate for the position that the injunctive claims</p> <p>4 possessed by class members who are not eligible for</p> <p>5 monetary damage, for monetary compensation because they</p> <p>6 are from states that do not allow to sue for damages</p> <p>7 here actually have some value? How does that speak to,</p> <p>8 again, to the adequacy under rule 23?</p> <p>9 MR. MOSKOVITZ: One of the most difficult tasks</p> <p>10 for lead counsel in a case like this where you have</p> <p>11 varying claims particularly with varying states is to</p> <p>12 come up with something that's fair, and he gets input</p> <p>13 from all the lawyers for the people in the various</p> <p>14 states. He makes the best judgment he can. It's messy.</p> <p>15 I mean it's bound to be imperfect and some people are</p> <p>16 going to be unhappy. But what he worked out, people</p> <p>17 were relatively happy for.</p> <p>18 JUDGE KATZMANN: So what is the incentive?</p> <p>19 MR. MOSKOVITZ: Pardon me?</p> <p>20 JUDGE KATZMANN: What is the incentive? What is</p> <p>21 the incentive with respect to those who are not eligible</p> <p>22 for monetary compensation?</p> <p>23 MR. MOSKOVITZ: The incentive during the</p> <p>24 settlement negotiations.</p> <p>25 JUDGE KATZMANN: Yes.</p>
<p style="text-align: right;"><b>Page 51</b></p> <p>1 I mean, look at his address on his brief. He's in</p> <p>2 Massachusetts. Mr. Alioto isn't. He's not licensed in</p> <p>3 25 states. I'm not either. Most lawyers aren't. He</p> <p>4 depended on people like the lawyers in the 22 states to</p> <p>5 come up with people. And he succeeded. It was a</p> <p>6 tremendous achievement.</p> <p>7 But in these three states it didn't happen,</p> <p>8 and these people didn't help at all. So at this point</p> <p>9 in time Massachusetts equals Texas. They're worthless</p> <p>10 and he did nothing wrong in signing a settlement</p> <p>11 agreement that gave up their worthless claims.</p> <p>12 JUDGE KATZMAN: Can I ask, again, returning to</p> <p>13 the earlier part of your discussion, and this may be</p> <p>14 repeating what you said already but I'm just trying to</p> <p>15 get this in my own head.</p> <p>16 MR. MOSKOVITZ: Okay.</p> <p>17 JUDGE KATZMANN: Did anyone in the settlement</p> <p>18 and distribution negotiations, and this goes to your</p> <p>19 colloquy with my colleagues, have incentive to advocate</p> <p>20 for the position that the injunctive claims possessed by</p> <p>21 class members who are not eligible for monetary</p> <p>22 compensation because they are from states that do not</p> <p>23 allow to sue for damages --</p> <p>24 MR. MOSKOVITZ: I'm sorry, I'm having a little</p> <p>25 trouble hearing you.</p>	<p style="text-align: right;"><b>Page 53</b></p> <p>1 MR. MOSKOVITZ: Not earlier?</p> <p>2 JUDGE KATZMANN: Right.</p> <p>3 MR. MOSKOVITZ: His duty to be fair to</p> <p>4 everybody. That's the incentive. But when you see some</p> <p>5 claims are worthless what's he supposed to do? You</p> <p>6 know, tell these lawyers from these other states your</p> <p>7 people get less because there's some nuisance value to a</p> <p>8 Massachusetts lawsuit? That didn't seem fair to him or</p> <p>9 to Special Master Quinn or to Judge Tigar. That just</p> <p>10 didn't seem fair. So it's inevitable. There's a class</p> <p>11 action with all kinds of people with different claims.</p> <p>12 If they worked out is they didn't break it up</p> <p>13 by states. One of the their objections in the trial</p> <p>14 court was, oh, this state ought to get more than that</p> <p>15 state. No, none of that. Everybody gets the same,</p> <p>16 minimum 25 bucks and then (inaudible) of your actual</p> <p>17 damages. And everybody thought that was relatively</p> <p>18 fair. But it's always going to be imperfect. I mean,</p> <p>19 this is a huge undertaking. But, I mean, you know, they</p> <p>20 want to nitpick every little thing and --</p> <p>21 JUDGE WARDLAW: This doesn't sound like legal</p> <p>22 argument.</p> <p>23 MR. MOSKOVITZ: Pardon me?</p> <p>24 JUDGE WARDLAW: This isn't sounding like legal</p> <p>25 argument. Do you have any further actual legal</p>

<p style="text-align: right;"><b>Page 54</b></p> <p>1 arguments? I don't want to --</p> <p>2 MR. MOSKOVITZ: Well --</p> <p>3 JUDGE WARDLAW: This is your life. You do class</p> <p>4 actions for a living.</p> <p>5 MR. MOSKOVITZ: Yeah, the cases we've cited, the</p> <p>6 Mego case, the Winn case, there was another case where</p> <p>7 they're all Ninth Circuit cases say, along with Mego,</p> <p>8 that these things are imperfect. You take into account</p> <p>9 the value of the claims. And if a claim is worthless or</p> <p>10 not worth as much the district court judge has the</p> <p>11 discretion to approve a plan of allocation that gives</p> <p>12 them less.</p> <p>13 Now, keep in mind that Judge Tigar dealt with</p> <p>14 this whole issue we're talking about not in terms of</p> <p>15 whether the settlement should be approved. He and Quinn</p> <p>16 allotted the settlement. It was a terrific settlement.</p> <p>17 It came up only with the plaintiff allocation, and I</p> <p>18 would suggest that you treat it the same way. If you</p> <p>19 have a problem with this, I hope you don't, don't undo</p> <p>20 this settlement and have all that money go back so that</p> <p>21 the class never sees it again.</p> <p>22 If you have a problem with the allocation at</p> <p>23 least we'll keep the money in the bank. Defendants have</p> <p>24 no interest in the allocation along the class members.</p> <p>25 JUDGE WARDLAW: How do you do that legally?</p>	<p style="text-align: right;"><b>Page 56</b></p> <p>1 MR. MOSKOVITZ: They could come to an agreement.</p> <p>2 But I would caution you that what I said earlier about</p> <p>3 giving objectors weapons to undo class settlements is</p> <p>4 very dangerous. It means, you know, they can get</p> <p>5 money --</p> <p>6 JUDGE WARDLAW: But I would submit to you that</p> <p>7 the only -- the problem was created by the people who</p> <p>8 settled.</p> <p>9 MR. MOSKOVITZ: Well, Special Master Quinn,</p> <p>10 Judge Tigar looked at this carefully and found that</p> <p>11 Mr. Alioto behaved properly, that he did his best to try</p> <p>12 to get representation for those three states and it just</p> <p>13 didn't work out in this case. But he still represented</p> <p>14 those people because of the nationwide injunction that</p> <p>15 he was seeking. So legally it was all fine. I mean,</p> <p>16 their accusation comes down to one thing, Mr. Alioto had</p> <p>17 a conflict, which he didn't, his interests were aligned</p> <p>18 with these three states. He would love to have gotten</p> <p>19 representatives from those three states. He'd get more</p> <p>20 money.</p> <p>21 All right. And then they say he was incompetent</p> <p>22 because he didn't go out and get clients from those</p> <p>23 states.</p> <p>24 JUDGE WARDLAW: All right, Counsel, now you're</p> <p>25 just repeating yourself. So anything further you want</p>
<p style="text-align: right;"><b>Page 55</b></p> <p>1 MR. MOSKOVITZ: Pardon me?</p> <p>2 JUDGE WARDLAW: How do you do that legally,</p> <p>3 uphold -- how could you say that there wasn't adequacy</p> <p>4 of representation but still uphold the settlement and</p> <p>5 order a redistribution?</p> <p>6 MR. MOSKOVITZ: Well, I don't think that's</p> <p>7 difficult. You just use the words you used a few</p> <p>8 minutes ago, that this half a billion dollars was</p> <p>9 unfairly deliberated all to the 22 states and some of it</p> <p>10 should go to the three states. That's an allocation</p> <p>11 question. I hope you don't do that, but I think that's</p> <p>12 the way to handle this rather than undo this settlement</p> <p>13 which would -- it would truly be a disaster for the</p> <p>14 class.</p> <p>15 JUDGE WARDLAW: Well, then perhaps -- perhaps</p> <p>16 maybe the parties could reach that and we wouldn't have</p> <p>17 to if you were to mediate this or something if that's</p> <p>18 what you think the correct solution is.</p> <p>19 MR. MOSKOVITZ: That could happen. I mean,</p> <p>20 there could be a settlement. Oh, you mean on the</p> <p>21 allocation?</p> <p>22 JUDGE WARDLAW: Uh-huh.</p> <p>23 MR. MOSKOVITZ: Yeah, that could happen.</p> <p>24 JUDGE WARDLAW: If you were to meet now and kind</p> <p>25 of bring it out.</p>	<p style="text-align: right;"><b>Page 57</b></p> <p>1 to sum up?</p> <p>2 MR. MOSKOVITZ: No. Defense counsel has a few</p> <p>3 comments.</p> <p>4 JUDGE WARDLAW: Yes, I can imagine.</p> <p>5 UNIDENTIFIED FEMALE: Thank you. May it please</p> <p>6 the Court. I realize I don't have a lot of time. As</p> <p>7 counsel for defendants, I'd really like to make just one</p> <p>8 critical point, regardless of how this Court resolving</p> <p>9 the question about the fairness of the distribution</p> <p>10 plan, and we think it was fair, but regardless of that,</p> <p>11 there is no basis to disturb the settlement agreement.</p> <p>12 They are two separate documents. And as this Court has</p> <p>13 recognized in the Mego case, questions about fairness of</p> <p>14 the settlement agreement and questions about the</p> <p>15 fairness of the distribution plan are two separate</p> <p>16 inquiries.</p> <p>17 Under the terms of the settlement agreements</p> <p>18 here defendants paid a single lump sum of almost half a</p> <p>19 billion dollars which indistinguishably covers the</p> <p>20 nationwide class and all state classes. The settlement</p> <p>21 agreement makes no judgment about the relative value of</p> <p>22 any claims whether asserted or unasserted.</p> <p>23 JUDGE CLIFTON: You don't care how the money is</p> <p>24 divided?</p> <p>25 UNIDENTIFIED FEMALE: We don't care how the</p>

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1 money is divided.  
 2 JUDGE CLIFTON: You're at complete peace.  
 3 You're happy.  
 4 UNIDENTIFIED FEMALE: That's right. And I would  
 5 point this Court to the Third Circuit's decision in the  
 6 In Re Pet Food's product liability litigation. That's  
 7 629F3D 333 at 346 to 349 and 358. It's a 2010 decision.  
 8 There the Third Circuit approved the release that was  
 9 contained in the settlement agreement and only remanded  
 10 for a determination as to whether allocation of  
 11 settlement funds to certain class members was fair,  
 12 reasonable, and adequate. There's nothing that  
 13 precludes this Court from doing the same thing here.  
 14 If I may, I'd like to address a couple of the  
 15 questions that the Court had, if this Court will permit  
 16 me a little bit more time. Thank you.  
 17 With respect to the question of valueless  
 18 claims, whether as a matter of overall fairness or  
 19 whether as a matter of settlement agreements, valueless  
 20 claims do not need to be compensated in all instances.  
 21 There is no rule that requires that. I would point this  
 22 Court to the Noyan vs. --  
 23 JUDGE WARDLAW: But no, that's true, but the  
 24 problem, I think, at some point was these were viable  
 25 claims and would have been told and would have lived had

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1 may release not only those claims that are alleged in a  
 2 complaint but also a claim based on the identical  
 3 factual predicate, and I'm quoting, "As that underlined  
 4 the claims in the settled class action," even though the  
 5 claim was not presented and might not have even been  
 6 presentable in the class action.  
 7 Global releases are exceedingly common. They  
 8 incentivize class settlements. That's what happened  
 9 here.  
 10 JUDGE CLIFTON: Well, they're possible. It  
 11 doesn't say that it's appropriate in any particular  
 12 case, and if you're willing to say they've got no viable  
 13 claim, there's nothing to worry about, then maybe we  
 14 should let your clients be the ones that decide there's  
 15 nothing to worry about. Why should we adjudicate for  
 16 the people in those states that you don't have a viable  
 17 claim, nobody brought it, but we're going to pretend  
 18 that it's been adjudicated. If you're so confident you  
 19 can tell your clients not to worry, they don't have any  
 20 viable claims so we can excise those states from the  
 21 release.  
 22 But of course you're not going to do that, and  
 23 your clients aren't going to agree to that. So why is  
 24 it the people in Massachusetts are the ones that take it  
 25 in the shorts?

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1 there been adequacy of representation.  
 2 UNIDENTIFIED FEMALE: The statute of limitations  
 3 actually ran on these, each of these claims a long time  
 4 ago. The Missouri claim was never brought.  
 5 JUDGE WARDLAW: Litigation? Where, in prefiling  
 6 of this complaint?  
 7 UNIDENTIFIED FEMALE: The Missouri --  
 8 JUDGE WARDLAW: I mean Counsel said they filed  
 9 claims on behalf of them. They just continue maintain  
 10 them because there --  
 11 UNIDENTIFIED FEMALE: There were never claims  
 12 filed on behalf of Missouri. There were no Missouri  
 13 state law damages claims filed. So the statute of  
 14 limitations on Missouri would have run in, it's a  
 15 five-year statute of limitations as far as I'm aware, so  
 16 that would have run in November of 2012. So we're  
 17 really talking ancient history. Now, this notion of  
 18 relation back --  
 19 JUDGE CLIFTON: Well, maybe your client has  
 20 nothing to worry about and doesn't need a release for  
 21 damage claims for people from Missouri.  
 22 UNIDENTIFIED FEMALE: So on the subject of  
 23 global releases, which are important to incentivize  
 24 defendants to enter into class settlements of this  
 25 magnitude, this circuit has found that a federal court

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1 UNIDENTIFIED FEMALE: A global release does not  
 2 convert otherwise valuable claims into -- otherwise  
 3 valueless claims into valuable ones.  
 4 JUDGE CLIFTON: But the premise is that the  
 5 claims are valueless. And you're not willing to take  
 6 the risk that that's not right. And so why should  
 7 anybody else be expected to take the risk that that's  
 8 not right?  
 9 UNIDENTIFIED FEMALE: Well, I guess in this case  
 10 it goes back to where I started, which is that the  
 11 settlement agreement, the money that we paid doesn't  
 12 make any distinction between the value of claims,  
 13 whether they're valueless, whether they're not  
 14 valueless. We paid one single lump sum.  
 15 JUDGE CLIFTON: Correct. But if the risk were  
 16 zero, as you're assuring us that it is, then your  
 17 clients could solve the problem as well by deciding,  
 18 fine, there's no risk so we'll take it. But they won't  
 19 do that, and that's what --  
 20 UNIDENTIFIED FEMALE: Well, we didn't do that.  
 21 JUDGE CLIFTON: You didn't do that.  
 22 UNIDENTIFIED FEMALE: We didn't do that in this  
 23 case.  
 24 JUDGE CLIFTON: And if we have this mediation I  
 25 suspect that question could be put to your clients, only

16 (Pages 58 to 61)

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1 I wouldn't expect to actually put it if I were the  
 2 mediator because it's absurd. Defendants are paying for  
 3 a global release. But that doesn't explain to me why we  
 4 should accept the argument that there's no risk here if  
 5 in fact nobody else is willing to step up and take it.  
 6 UNIDENTIFIED FEMALE: But then it's a question  
 7 of distribution, and that leaves me where I began, that  
 8 really to the extent this --  
 9 JUDGE WARDLAW: But then do you also agree that  
 10 this is potentially something you could mediate?  
 11 UNIDENTIFIED FEMALE: Theoretically.  
 12 JUDGE WARDLAW: Right. All right. Thank you,  
 13 Counsel.  
 14 I'll give you two minutes.  
 15 JUDGE CLIFTON: Tell us you've reached an  
 16 agreement, it'll be worth our while.  
 17 UNIDENTIFIED FEMALE: First off, I think in many  
 18 of these questions they keep going back to by the time  
 19 of the settlement the claims had no value. Well, let's  
 20 look at why the claims had no value. The claims -- we  
 21 maintain that they still would have. But if they had no  
 22 value the only reason is because in 2010 lead counsel  
 23 entered into a stipulation which got none of his clients  
 24 anything. No client benefitted from that stipulation.  
 25 The only person who benefitted from that stipulation was

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1 UNIDENTIFIED FEMALE: Yes, because the  
 2 settlement itself at the end of the day gives up all of  
 3 the claims, both damages and injunctive relief of the  
 4 three omitted repealer states in exchange for nothing,  
 5 and we think that is in direct violation of Koby. And  
 6 let me just say, in their brief --  
 7 JUDGE CLIFTON: I want to focus your attention  
 8 on the question Judge Wardlaw just asked. Do you really  
 9 want this settlement to go away or are you focused, as  
 10 well, on the plan of allocation that defendants are  
 11 desperately trying to put it on the table by itself?  
 12 UNIDENTIFIED FEMALE: What I really want is for  
 13 this case to settle and for us to be able to participate  
 14 equally in the \$577 million allocation.  
 15 JUDGE CLIFTON: So it sounds like your side of  
 16 the room might be amenable to seeing if a resolution can  
 17 be reached as well?  
 18 UNIDENTIFIED FEMALE: Absolutely. Let me just  
 19 say that back in the trial court the defendants offered  
 20 to tweak the settlement allocation and it was lead  
 21 counsel who refused, and that is in Gianasca's ER 554 at  
 22 133, lines 10 to 14.  
 23 And finally, he keeps talking about, well, he  
 24 couldn't go out and find a plaintiff in states where  
 25 he's not licensed. First of all, we know that's not

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1 lead counsel because it enabled him to hide his  
 2 malpractice and start the clock ticking on the one-year  
 3 claim for malpractice.  
 4 That stipulation was essentially the first  
 5 part of a settlement because in the stipulation he  
 6 agreed that he would no longer bring any claims, any new  
 7 claims for any new party, any new plaintiff, or any new  
 8 legal claims. So he gave up all of the claims and the  
 9 omitted repealer states at that time. And in exchange  
 10 for it, we got nothing, absolutely nothing.  
 11 Now, very important, at the time of the  
 12 stipulation in 2010 the statute of limitations had not  
 13 run on any of these states. So he claims he can sit  
 14 back and wait for others to do his job and bring him a  
 15 plaintiff. Well, even if that had happened, the day  
 16 after the stipulation he'd given up their claims. He  
 17 had given up perfectly good claims, which is why we are  
 18 seeking a reversal of the order approving the  
 19 stipulation, which is why in Reynolds --  
 20 JUDGE WARDLAW: But do you also want to -- do  
 21 you want the approval of the settlement reversed?  
 22 UNIDENTIFIED FEMALE: We have sought that, Your  
 23 Honor.  
 24 JUDGE WARDLAW: Do you want to participate in  
 25 the settlement?

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1 true because he already had.  
 2 JUDGE CLIFTON: That's a tangent.  
 3 JUDGE WARDLAW: Yeah, you can be done.  
 4 UNIDENTIFIED FEMALE: And it's legally required.  
 5 JUDGE WARDLAW: I think we're -- I think we're  
 6 finished with argument in this case today.  
 7 UNIDENTIFIED FEMALE: Okay. I thank you very  
 8 much for your time.  
 9 JUDGE WARDLAW: We're hearing the same arguments  
 10 over and over. So thank you very much, Counsel. This  
 11 Indirect Purchaser, plaintiffs, vs. Finn is submitted  
 12 and this session of the court is adjourned for today.  
 13 THE BAILIFF: All rise.  
 14 [The recording concludes.]  
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17 (Pages 62 to 65)

1 In Re:  
2 Indirect Purchaser vs. Finn Hearing

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3  
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